

 **Maryland**
Department of Economic &
Employment Development

William Donald Schaefer, Governor
J. Randall Evans, Secretary

Board of Appeals
1100 North Eutaw Street
Baltimore, Maryland 21201
Telephone: (301) 333-5032

Board of Appeals
Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

- D E C I S I O N -

| | | |
|------------------|----------------------|-------------------------------|
| | Decision No.: | 896-SE-89 |
| | Date: | October 17, 1989 |
| Claimant: | Appeal No.: | 8901119, 8901120 & 8901121 |
| | S. S. No.: | |
| Employer: | L O. No.: | 5 |
| | Appellant: | AGENCY |

Issue: Whether the claimant was unemployed within the meaning of Section 4 and 20(1) of the law; whether the claimant is eligible for benefits pursuant to Section 3(b) of the law.

- NOTICE OF RIGHT OF APPEAL TO COURT -

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY. IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

November 16, 1989

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON

- A P P E A R A N C E S -

FOR THE CLAIMANT:

John O. Williams, Claimant

John T. McGucken, Legal Counsel, D.E.E.D.
Shirley Krantz, U. I. Supervisor, Frederick

FOR THE EMPLOYER:

Fae Brown, Sales Mgr.
Ralph Brown, President

EVALUATION OF EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced into this case, as well as the Department of Economic and Employment Development's documents in the appeal file.

FINDINGS OF FACT

The claimant became associated with Ralph Brown Realty t/a Trading Post, Inc., in March of 1986 as a part-time associate. At this time he was working full time in configuration design for MaComm. In November, 1986, the claimant changed his position with Trading Post from part-time to a full-time sales associate until October 29, 1988.

As a full-time associate, the claimant volunteered for more than his share of "floor time" and generally worked more than his share of "floor time". Floor time includes answering telephone calls in the office, taking leads from the calls and generally working around the office. In addition, the claimant would man booths for Trading Post, which were located at area malls. The average amount of floor time spent by a full-time sales associate was 48 hours per month during 1986-87 and 44 hours in 1988.

A sales associate, working full-time, would spend around 50 hours per week. This included "floor time" as well as time spent showing properties, posting properties, soliciting leads, obtaining listings, following up on phone calls and generally familiarizing oneself with the houses that are for sale. The claimant was in the office every day, and worked in excess of 40 hours per week. He operated as and held himself out as a full-time sales associate.

Once a sale was made, the parties went to closing approximately 60-90 days after the contract was signed. The agent is paid at closing. During 1986, the claimant earned \$9,719.35 as a real estate agent, of which \$790.35 was received after he became full-time in November. The claimant earned \$10,077 in 1987 and \$14,080.98 in 1988.

The claimant was interested in real estate management and was looking to be placed into a Management Trainee position. He took Graduate Realtor courses and was reimbursed for one-half of two courses that he took while with Trading Post. He is currently working towards his Broker's license.

While working full time as a real estate agent, the claimant was looking for jobs in configuration design. However, the claimant didn't take time off from his sales position in 1988 to look for jobs.

During the time that he filed claims, the claimant was performing services as a full-time real estate agent.

CONCLUSIONS OF LAW

Article 95A, Section 20(1) defines "unemployment" as follows:

"An individual shall be deemed "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount plus allowances for dependents.

Wages are defined in 20(n) as "all remuneration for personal services, including commissions, bonuses, tips and the cash value of all compensation in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the Executive Director."

The Board has ruled many times that where a claimant performs services in each of several weeks, with the expectation of receiving a commission, and where a large commission is eventually paid, it is appropriate to attribute the commission check to those weeks in which the claimant actually performed the services. (See, Pontius v. ARC Technology, 250-BR-87, and Dayton, 199-BR-83.)

The claimant, in this case, worked for Ralph Brown Realty (t/a Trading Post) at the office and in mall booths, soliciting business. He worked over 50 hours per week attempting to generate business for Ralph Brown Realty and, in effect, for himself, for the business he generated led to sales for which he received a commission. The claimant, from November 1986 through October of 1988, received commissions totalling approximately \$25,000. Commissions are considered wages under 20(n). The claimant performed personal services and received wages which were payable for services performed during the periods in question. Therefore, the claimant was not unemployed within the meaning of Section 20(1).

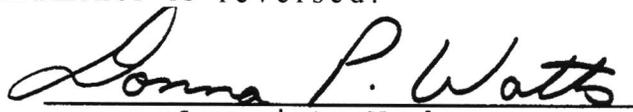
Section 3(b) permits weekly benefits for one who is partially unemployed. However, a claimant is not entitled to unemployment benefits where he is working on a full-time basis, and is therefore not unemployed, even though he is earning less than his weekly benefit amount. (See, Barclay v. Freeway Gulf Station, 839-BH-83.) In this case, the claimant was operating as a full-time real estate agent, working more than 50 hours per week. Therefore, the claimant is not entitled to partial benefits under Section 3(b).

DECISION

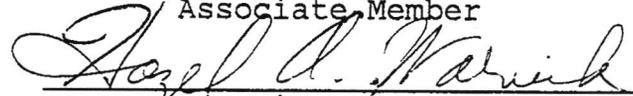
The claimant was not unemployed within the meaning of Section 20(1) of the Maryland Unemployment Insurance Law. He is disqualified from receiving benefits for the weeks ending February 21, 1987, March 21, 1987 and October 31, 1987. Furthermore, since the Hearing Examiner ruled on and allowed benefits for the week ending February 7, 1987 and the period from February 28, 1988 to March 12, 1988, even though they were not part of the three cases before the Hearing Examiner, the claimant is disqualified from receiving benefits for those weeks also.

The claimant is not eligible for benefits pursuant to Section 3(b) of the law.

The decision of the Hearing Examiner is reversed.



Associate Member



Associate Member

w:w
kbm

Date of Hearing: September 8, 1989
COPIES MAILED TO:

CLAIMANT

EMPLOYER

UNEMPLOYMENT INSURANCE - FREDERICK

John McGucken, Legal Counsel
Recoveries - Room 413

William Donald Schaefer
Governor

J. Randall Evans
Secretary

1100 North Eutaw Street
Baltimore, Maryland
21201

(301) 333-5040



Maryland

Department of Economic & Employment Development

- DECISION -

Date: Mailed: 5/2/89

Claimant: John O. Williams

Decision No.: 8901119, 8901120,
8901121

S. S. No.:

Employer: Trading Post, Inc.

LO. No.:

Appellant:

ISSUE: Whether the claimant was unemployed within the meaning of Section 4 and 20(1) of the Law. Whether the claimant is eligible for benefits pursuant of Section 3(b) of the Law.

- NOTICE OF RIGHT OF FURTHER APPEAL -

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE. OR WITH THE APPEALS DIVISION. ROOM 515, 1100 NORTH EUTAW STREET. BALTIMORE. MARYLAND 21201. EITHER IN PERSON OR BY MAIL

5/17/89

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON

-APPEARANCES-

FOR THE CLAIMANT:

John O. Williams - Present

FOR THE EMPLOYER:

Fae Brown
Sales Manager
Robert Fowler
Assistant Sales Manager

OTHER: Shirley Krantz
Acting Supervisor
Unemployment Insurance

FINDINGS OF FACT

The claimant filed for unemployment insurance, establishing a first benefit year effective November 9, 1986 and a weekly benefit amount of \$195.00. During the time periods in issue, February 1, 1987, to February 7, 1987, February 15, 1987 to February 21, 1987, March 15, 1987 to March 21, 1987 and October 25; 1987 to October 31, 1987, February 28, 1988 to March 12,

1988 the claimant was associated with the Trading Post Incorporated Real Estate Agency under the terms of a standard Real Estate Contract, which specifically states that the claimant was not an employee but rather was an independent contractor selling real estate on a commission basis only. The monies the claimant received during the above time periods, paid under the terms of the contract constituted commissions and not wages.

CONCLUSIONS OF LAW

Mindful of a Board of Appeals decision, which does not control in this case, it is held that the claimant was not employed within the meaning of and intent of Section 4 and 20(1) and Sections 3(b) of the Maryland Unemployment Insurance Law. The monies he received were not wages and, therefore, whether they exceeded his weekly benefit amount of \$195.00 is immaterial. The determinations of the Claims Examiner which ruled under the board decision, will be reversed.

DECISION

The claimant was not unemployed nor partially employed within the meaning of Section 4 and 20(L) and/or 3(b) respectively of the Maryland Unemployment Insurance Law. No disqualification under these provisions of the Statute will be imposed for the time periods in issue, February 1 to February 7, 1987, February 15, to February 21, 1987 and March 15, to March 21, 1987, October 25, to October 31, 1987 and February 28 to March 12, 1988.

The determinations of the Claims Examiner are hereby reversed.



P. J. Hackett
Hearing Examiner

Date of hearing: 2/23/89
kac/Specialist ID: 94949/2393
Copies mailed on May 2, 1989 to:

Calimant
Employer
Unemployment insurance - Frederick (MABS)